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November 3, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: Reply Comments
MM Docket No. 95-138; RM-8684
Amendment of Section 73.202(b)
FM Table of Allotments
(Casper, Wyoming)

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Dear Mr. Caton:

Transmitted herewith on behalf of Bruce L. Erickson; Hart Mountain, Inc. and Rule Communications is an original and four copies of Reply Comments in the above-referenced proceeding.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,



John F. Garziglia

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
) MM Docket No. 95-138
Amendment of Section 73.202(b)) RM-8684
FM Broadcast Stations)
(Casper, Wyoming))
To: Chief, Allocations Branch

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REPLY COMMENTS

Bruce L. Erickson, by his attorney; Hart Mountain Media, Inc., by its attorney; and Rule Communications, by its attorney (collectively, the "Petitioners"), pursuant to Notice of Proposed Rule Making, DA 95-1817, released August 28, 1995, and Sections 1.415 and 1.420 of the Commission's Rules, hereby submit a reply to the October 19, 1995 Comments Opposing Proposed Allotments ("Opposition") filed by Mount Rushmore Broadcasting, Inc. ("Mt. Rushmore").¹ The following is respectfully submitted:

1. In the Opposition, Mt. Rushmore bases its objection to the Petition for Rule Making solely on the alleged economic impact three new competitors could have on the economic viability of existing stations in the Casper, Wyoming radio market, including Mt. Rushmore's KQLT(FM) and KASS(FM). However, Mt. Rushmore's comments fly squarely in the face of the Commission's established policy with respect to allegations concerning the economic hardship or other competitive effects on operating stations presented by proposed new FM channel allotments. Mt.

¹. The Notice of Proposed Rule Making specified a date for reply comments of November 3, 1995. Accordingly, these Reply Comments are timely filed.

Rushmore, in essence, seeks to reimpose an "economic harm" standard for considering new FM allotments, a standard that the Commission has expressly abandoned.

2. The Commission has plainly stated its policy regarding the competitive effect proposed allotments may have on existing licensees in the same community of license. Basically, the Commission "no longer addresses the potential economic impact of new allotments on existing stations." Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Pierce, Bloomington, Markham, San Pedro and Bishop, Texas), 8 FCC Rcd 3528, 3530-31 (1993) citing FM Channel Assignments: Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations, 3 FCC Rcd 638 (1988), aff'd 4 FCC Rcd 2276 (1989). The Commission reinforced that position just last week. See Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Southampton, Bridgehampton, Westhampton and Calverton-Roanoke, New York), FCC 95-379, ¶ 6, released October 24, 1995 ("It remains our policy not to address the potential economic impact of new allotments on existing stations.") citing 3 FCC Rcd 638.

3. Mt. Rushmore's Opposition relies solely on the potential, allegedly detrimental, economic effects granting the instant Petition for Rule Making would have on existing stations in the Casper, Wyoming market. In this regard, it is noteworthy that according to its own figures, Mt. Rushmore currently owns 25% (2 of 8) of the radio stations in the Casper market. The

Petitioners' proposals would reduce Mt. Rushmore's competitive dominance to 18% of the market's stations. In light of the precedent set forth above, Mt. Rushmore's Opposition must fail, and the instant Petition for Rule Making should be granted. To the extent the Opposition is critical of the Commission's current policy of disregarding the potential economic effects on existing stations when granting allotments for new stations, those sentiments would be more properly raised in the rule making proceeding cited in the Opposition.²

4. In any event, Mt. Rushmore's argument is not persuasive, even were this the appropriate proceeding. Mt. Rushmore's attempt to support its assertions that such economic effects must be considered by the Commission in making the proposed allocations by citing Supreme Court precedent is without merit. Mt. Rushmore cites FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 473 (1940), as standing for the proposition that the "Commission cannot allot stations that are destined to fail merely because technology permits such an allotment." Opposition at 9. However, this interpretation of Sanders Bros. misunderstands that case. Sanders Bros., in the regard cited by Mt. Rushmore, stands for the proposition that the Commission may inquire of an applicant's financial qualifications to ensure that the Commission does not license an applicant whose station is

². Opposition at 2-3, citing Review of Commission Commercial FM Allotment and Licensing Policy, RM 92-7933, Petition for Rulemaking, filed February 10, 1992 by the National Association of Broadcasters.

"destined to fail" due to its own, internal inability to afford the costs of operation. 309 U.S. at 475. Moreover, as to stations that are "destined to fail" due to competition from other stations, the Court holds the exact opposite of what Mt. Rushmore cites Sanders Bros. for:

In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

* * * *

Plainly it is not the purpose of the [Communications] Act to protect a licensee against competition but to protect the public.

Id. Thus, Mt. Rushmore's attempt to base its opposition to competition from the three Casper applicants on Supreme Court precedent must fail as well.

5. Finally, in that Mt. Rushmore bases its claim that granting the instant Petition for Rule Making is not in the public interest solely on economic concerns, Mt. Rushmore does not mention in any regard, beneficial or detrimental, the services the Petitioners would provide to the public. Rule Communications intends to offer a format largely featuring talk and religious programming. Bruce L. Erickson likewise intends to offer religious oriented programming. Neither of these formats should impact on Mt. Rushmore's competitive motivations. Hart Mountain, Inc. intends to offer secular programming in the interest of fostering programming diversity and offering listeners additional choices. It would be contrary to the public

interest to deny any of the petitioners an opportunity to compete with Mt. Rushmore based solely upon Mt. Rushmore's fear that new broadcasters in the market may offer services that are superior to that of Mt. Rushmore's two existing FM stations or to protect Mt. Rushmore by restricting the entry of new broadcast stations into the market. Accordingly, the public interest would be well served by a grant of the instant Petition for Rule Making and the allotment of the specified channels to Casper.

CONCLUSION

In light of the foregoing, the Petitioners each re-affirm their expressions of interest and respectfully request that Channel 273A and Channel 284A be allotted to Casper, Wyoming, with a reservation of Channel 273A for the application of Rule Communications and a reservation of Channel 284A for the application of Hart Mountain Media, Inc., which will leave the application of Bruce L. Erickson as a singleton on Channel 247A, thus resolving the mutual exclusivity now existing on Channel 247A at Casper, Wyoming.


Respectfully Submitted,

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November 3, 1995

CERTIFICATE OF SERVICE

I, Tracey S. Westbrook, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that true copies of the foregoing "Reply Comments" were sent this 3rd day of November, 1995 by U.S. first class mail, postage prepaid, to the following:

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Tracey S. Westbrook

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